Re Khairulnizam bin Jamaludin; ex-parte Hong Leong Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)-204–12 OF 2013
ABDUL WAHAB PATAIL, AZAHAR MOHAMED AND MOHTARUDIN BAKI JJCA
11 JULY 2014

Bankruptcy — Bankruptcy petition — Application to set aside bankruptcy petition — Appeal — Whether judgment creditor must seek leave before filing notice of bankruptcy against social guarantor — Whether creditor must first exhaust all avenues to recover debts — Bankruptcy Act 1967 s 5(3)

Bankruptcy — Bankruptcy petition — Social guarantors — Whether judgment creditor must seek leave before filing notice of bankruptcy against social guarantor — Whether creditor must first exhaust all avenues to recover debts — Bankruptcy Act 1967 s 5(3)

This appeal concerned the question whether a judgment creditor must seek leave before filing a notice of bankruptcy against a social guarantor. The appellant argued that the provision of s 5(3) of the Bankruptcy Act 1967 ('Act') without further provision that prior leave must be obtained, means that the petitioning creditor could file a bankruptcy petition, and if a guarantor is not satisfied as to whether he has exhausted all avenues to recover debts owed to him by the debtor, he could apply to set aside the bankruptcy petition. The appellant appealed against the decision of the High Court requiring such leave.

Held, dismissing the appeal with costs of RM10,000:

(1) The object of s 5(3) of the Act is to protect social guarantors from unnecessary bankruptcy petitions by requiring the creditor to exhaust all other available avenues to recover the debts before becoming entitled to commence a bankruptcy action. A social guarantor remains exposed to the very exposure s 5(3) seeks to remedy if the creditor can serve a bankruptcy petition and put the social guarantor into having to incur legal costs, without first proving to the satisfaction of the court he had exhausted all other avenues. Bankruptcy action against social guarantors is intended to be confined to being the avenue of last resort. That '... he has exhausted all avenues to recover debts owed to him by the debtor' is a fact known only to the petitioning creditor, not the social guarantor (see para 6(d)–(e)).

[Bahasa Malaysia summary

Rayuan ini berkaitan persoalan sama ada pemiutang penghakiman perlu memohon kebenaran sebelum memfailkan notis kebankrapan terhadap penjamin sosial. Perayu berhujah bahawa peruntukan s 5(3) Akta Kebankrapan 1967 ('Akta') tanpa peruntukan selanjutnya di mana kebenaran terdahulu perlu diperolehi, bermaksud bahawa pemiutang petisyen boleh memfailkan petisyen kebankrapan, dan jika penjamin tidak berpuas hati berhubung sama ada dia telah menggunakan semua peluang untuk mendapat balik hutang yang terhutang kepadanya oleh penghutang, dia boleh memohon untuk mengetepikan petisyen kebankrapan itu. Perayu merayu terhadap keputusan Mahkamah Tinggi yang menghendaki kebenaran tersebut.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Tujuan s 5(3) Akta Kebankrapan 1967 adalah untuk melindungi penjamin-penjamin sosial daripada petisyen-petisyen kebankrapan yang tidak perlu dengan menghendaki pemiutang menggunakan semua peluang lain yang ada untuk mendapat balik hutang sebelum layak untuk memulakan tindakan kebankrapan. Penjamin sosial masih terdedah kepada pendedahan yang ingin diremedikan s 5(3) jika pemiutang boleh menyampaikan petisyen kebankrapan dan menyebabkan penjamin sosial menanggung kos perundangan, tanpa terlebih dahulu membuktikan dengan memuaskan kepada mahkamah yang dia telah menggunakan semua peluang lain. Tindakan kebankrapan terhadap penjamin sosial bermaksud untuk dihadkan sebagai jalan peluang terakhir. Bahawa '… he has exhausted all avenues to recover debts owed to him by the debtor' adalah fakta yang diketahui hanya oleh pemiutang petisyen, bukan penjamin sosial (lihat perenggan 6(d)–(e)).]

Cases referred to

Azham Othman; Ex p Affin Bank Bhd [2012] 2 CLJ 96, HC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3, 5, 5(3)
Companies Act 1965 s 219

Appeal from: Bankruptcy No 29–3882 of 2011 (High Court, Kuala Lumpur)

HK Tan (Sidek Teoh Wong & Dennis) for the appellant.
Yusman bin Che Aman (Shamsuddin & Co) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] This appeal by Hong Leong Bank Bhd concerns the question whether a judgment creditor must seek leave before filing a notice of bankruptcy against a social guarantor.

[2] Section 5(3) of the Bankruptcy Act 1967 provides:

> (3) A petitioning creditor shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court that he has exhausted all avenues to recover debts owed to him by the debtor.

[3] It was submitted for the appellant bank that:

> 11. Walaubagaimana pun, Seksyen 5(3) Akta Kebankrapan 1967 tersebut tidak memperuntukkan bahawa satu permohonan berlainan yang tersendirinya harus difailkan terlebih dahulu sebelum Notis Kebankrapan boleh difailkan terhadap Penjamin Sosial.
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> 12. Pihak Perayu berhujah bahawa sesungguhnya Akta Kebankrapan 1967 mahupun Kaedah-Kaedah Kebankrapan 1969 tidak memperuntukkan bahawa satu permohonan bagi memohon kebenaran perlu dibuat oleh pihak Pemiutang Penghakiman bagi membuktikan kepada Mahkamah Yang Mulia ini bahawa kesemua usaha yang munasabah telahpun dibuat bagi mendapatkan kembali jumlah terhutang terhadap Peminjam utama.

[4] The point made in the submission is that the provision of s 5(3) alone, without further provision that prior leave must be obtained, means that the petitioning creditor could file a bankruptcy petition, and if a guarantor is not satisfied as to whether he has exhausted all avenues to recover debts owed to him by the debtor, he could apply to set aside the bankruptcy petition.

[5] In *Azham Othman; Ex p Affin Bank Bhd* [2012] 2 CLJ 96, it was held by the High Court that leave was not necessary. The High Court referred to the matter as follows:

> (II) The shortcoming of this insertion to protect the social guarantor is that the draftsmen have not provided a specific procedure and mechanism to enable the judgment creditor to satisfy the criteria set-out in s 5(3). The failure will place judgment creditors in a position where they cannot issue a bankruptcy notice without the leave of court.
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> ...
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> (III) In my view that failure to provide a specific procedural mechanism does not mean the judgment creditor cannot seek the leave of court and satisfy the criteria in s 5(3) of the Bankruptcy Act 1967 before issuing the bankruptcy notice. In my view there are various procedural methodologies the judgment creditor could employ to

satisfy the criteria set-out in s 5(3). One is O 5 r 3 of the Rules of the High Court 1980 which states:

> Proceedings by which an application is to be made to the High Court or a judge thereof under any written law must be begun by originating summons except where by these rules or by or under any written law the application in question is expressly required or authorized to be made by some other means. This rule does not apply to an application made in pending proceedings.

I am mindful of the fact that the Rules of the High Court 1980 generally may not apply to bankruptcy proceedings unless there is lacuna. However, on this issue it must be noted the seeking of leave is not a commencement of bankruptcy proceedings under the Bankruptcy Act 1967 or its rules. I am also mindful of the fact of the decision of Justice Gopal Sri Ram JCA (as he then was) in *Malaysia Building Society Bhd* where it was held that the Bankruptcy Act 1967 is a complete code within the framework of which must be found all the powers exercisable by the high court by the bankruptcy jurisdiction. If O 5 r 3 of the Rules of the High Court 1980 is not employed then taking the lead from the above case one may file an application at the time the request for bankruptcy notice is filed and obtain the leave of court before the bankruptcy notice is issued. The application can be ex parte and must specifically seek an order for the bankruptcy notice to be issued only upon leave being granted. It will be prudent to serve the application to the judgment debtor at leave stage at the last known address to give ample opportunity for the judgment debtor to contest the same.

[6] With respect the reasoning overlooks the fact that interpretation is not about what could have been written in but was not, but upon what the words that had been written mean, and how that intention is to be put into effect. In our view, the appellant's argument is without merit for the following reasons:

(a) the 'social guarantor' provision, inserted by Act A1197 into s 5, is defined in s 3 as follows:

> 'social guarantor' means a person who provides, not for the purpose of making profit, the following guarantees:
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> (a) a guarantee for a loan, scholarship or grant for educational or research purposes;
>
> (b) a guarantee for a hire-purchase transaction of a vehicle for personal or non-business use; and
>
> (c) a guarantee for a housing loan transaction solely for personal dwelling'

(b) in providing as to conditions on which a creditor may petition, s 5 set-out clearly when a creditor shall not be entitled to present a bankruptcy petition against a debtor;

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(c) s 5(3) clearly states that a '... petitioning creditor shall not be entitled to commence any bankruptcy action against a social guarantor unless he proves to the satisfaction of the court he has exhausted all avenues to recover debts owed to him by the debtor';

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(d) the object is to protect social guarantors from unnecessary bankruptcy petitions by requiring the creditor to exhaust all other available avenues to recover the debts before becoming entitled to commence a bankruptcy action. A social guarantor remains exposed to the very exposure s 5(3) seeks to remedy if the creditor can serve a bankruptcy petition and put the social guarantor into having to incur legal costs, without first proving to the satisfaction of the court he had exhausted all other avenues. In plain language, bankruptcy action against social guarantors is intended to be confined to being the avenue of last resort see *Azham Othman; Ex p Affin Bank Bhd*.

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(e) that '... he has exhausted all avenues to recover debts owed to him by the debtor' is a fact known only to the petitioning creditor, not the social guarantor; and

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(f) the submission for the appellant bank, if accepted, would not only render the protection under s 5(3) illusory, but would also shift the burden of proof upon the social guarantor that to show there are other avenues, when the social guarantor cannot be expected to know what avenues, if any, had been pursued by the creditor.

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[7] The introduction of s 5(3) underlines the need to rein in the practice of extortion using bankruptcy and winding up petitions to obtain payment instead of the procedures established by law for execution. The law has provided individual creditors with adequate procedures for execution. The bankruptcy and the winding up petitions are for the purpose of identifying those who are unable to pay their debts as they fall due, and protect the public from extending credit to such person or company, and in such case to provide protection to all the creditors as to recovery of debts owed. When an individual creditor uses, for example the s 219 of the Companies Act 1965 notice to obtain full payment of a debt due, that is nothing short of abusing the process as well as obtaining a preference over other creditors who do not receive full payment. On the other hand, if all creditors were able to receive full payment, the person or the company was not bankrupt in the first place, and the procedure had therefore been abused. The courts cannot allow abuses which provide cause of action against the party seeking to employ it.

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[8] Accordingly, we dismiss the appeal with costs in the sum of RM10,000. Deposit refunded to the appellant.

Appeal dismissed with costs of RM10,000.

Reported by Kanesh Sundrum